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November 8, 2017

Via Certified Mail, Return Receipt Requested

Tim Grier
Regional Manager
Eastern Metal Recycling
145 Cannon St.
Green Island, NY 12183

Re: Notice of Violation and Intent to File Suit under the Clean Water Act

Dear Mr. Grier,

We write on behalf of our client, Riverkeeper, Inc.,¹ to notify you of our intent to file suit against Eastern Metal Recycling, Inc., pursuant to Section 505 of the federal Clean Water Act ("CWA")² for violations of the CWA.

We intend to file suit, as an organization and on behalf of adversely affected members, in the United States District Court for the Northern District of New York seeking appropriate equitable relief, civil penalties, attorney's fees and other relief no earlier than 60 days from the postmark date of this letter.³

¹ Riverkeeper, Inc. is a not-for-profit environmental organization existing under the laws of the state of New York, headquartered in Ossining, New York. Riverkeeper's mission includes safeguarding the environmental, recreational and commercial integrity of the Hudson River and its ecosystem, as well as the watersheds that provide New York City with its drinking water. Riverkeeper was originally founded by the Hudson River Fisherman's Association, a group of fishermen concerned about the ecological state of the Hudson River, and the effect of its polluted and degraded condition on fish. Riverkeeper achieves its mission through public education, advocacy for sound public policies and participation in legal and administrative forums. Riverkeeper has more than 3,000 members, many of whom reside near to, use and enjoy the Hudson River and its tributaries; waters that are polluted by industrial stormwater runoff.

² 33 U.S.C. § 1365. We refer to statutory provisions by their section in the Clean Water Act and provide the parallel citation to the United States Code only on first reference.

³ See 40 C.F.R. § 135.2(a)(3)(c) (notice of intent to file suit is deemed to have been served on the postmark date).

We intend to take legal action because Eastern Metal Recycling is discharging polluted stormwater from Eastern Metal Recycling's scrap metal recycling facility at 145 Cannon St., Green Island, NY 12183 ("the Facility") to the waters of the United States without a permit in violation of Sections 301(a) and 402(p)(2)(B) of the Clean Water Act.⁴ Further, Eastern Metal Recycling has not applied for coverage under, nor complied with the conditions of, an individual State Pollutant Discharge Elimination System ("SPDES") permit or the General Permit for the Discharge of Stormwater Associated with Industrial Activity ("General Permit")⁵ issued by the New York State Department of Environmental Conservation ("DEC"), in violation of Sections 402(p) and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

I.

BACKGROUND

With every rainfall event, hundreds of millions of gallons of polluted rainwater pour into the Hudson River and other receiving waters. Agencies and water quality specialists agree that stormwater⁶ pollution accounts for more than half of the total pollution entering the marine environment each year.

DEC has designated more than 7,000 river miles, 319,000 acres of larger waterbodies, 940 square miles of bays and estuaries, and 592 miles of Great Lakes shoreline in New York State as "impaired," or not meeting water quality standards, and unable to support beneficial uses such as fish habitat and water contact recreation.⁷ For the overwhelming majority of water bodies listed as impaired, stormwater runoff is cited as a primary source of the pollutants causing the impairment. Contaminated stormwater discharges can and must be controlled in order to improve the quality and health of these waterbodies.

Stormwater discharges flow from Eastern Metal Recycling's facility directly into the Hudson River. DEC has classified the portion of the Hudson River running through Green Island, New York, as a class C water.⁸ Under New York's Water Quality Standards, a waterbody that is designated as class C is meant to be suitable for fish, shellfish, and wildlife propagation and survival.⁹ The New York State Water Quality Standards set numeric and narrative criteria for different water pollution parameters including dissolved oxygen, oil and grease, suspended and

⁴ 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

⁵ New York State Department of Environmental Conservation, SPDES Multi-Sector General Permit for Stormwater Discharges Associated With Industrial Activity, Permit No. GP-0-12-001, (hereinafter "General Permit"), available at <http://www.dec.ny.gov/chemical/9009.html> (last visited June 22, 2017). This General Permit replaces earlier general permits for the discharge of stormwater associated with industrial activity. It became effective on October 1, 2012, and will expire on September 30, 2017.

⁶ Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt. See 40 C.F.R. § 122.26(b)(13).

⁷ See EPA, Watershed Assessment, Tracking and Environmental Results, New York Assessment Data for 2012, http://ofmpub.epa.gov/waters10/attains_state.report_control?p_state=NY&p_cycle=2012&p_report_type=A (last visited Oct. 14, 2014).

⁸ See 6 N.Y.C.R.R. § 858.4

⁹ See 6 N.Y.C.R.R. § 701.8

settleable solids, bacteria (pathogens), pH, temperature, nutrients, and others. A waterbody must meet these numeric and narrative criteria in order to support its designated uses.¹⁰

II.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED AND ACTIVITIES ALLEGED TO BE VIOLATIONS

A. Eastern Metal Recycling Is Discharging Stormwater Associated with Industrial Activity to Waters of the United States without a Permit.

The CWA prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid SPDES permit.¹¹ Eastern Metal Recycling's industrial activity at the Facility has caused and continues to cause a "discharge of pollutants" within the meaning of Section 502(12) of the CWA¹² and a "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14) from the Facility on at least each and every day that there has been a rain event of more than 0.1 inches.¹³ This occurs frequently. In 2016 alone, there were 64 days on which over 0.1 inches of rain fell on nearby Albany International Airport.¹⁴

Eastern Metal Recycling's activities at the Facility include, but are not limited to the purchase, collection, processing, storage, reshipment and resale of scrap metal outdoors and the operation and storage of industrial equipment. Riverkeeper, Inc., believes the Facility houses scrap piles that contain, but are not limited to, industrial scrap steel and non-ferrous materials, including but not limited to aluminum, copper, brass, stainless steel, bronze, zinc and various alloys that are contaminated with industrial pollutants.

Because Eastern Metal Recycling fails to adequately shelter and otherwise contain these materials to prevent their release to the environment, precipitation falls on and flows over exposed materials, fluids, and particulates. Polluted stormwater discharges flow from the facility through storm drains into the Hudson River. The Hudson River is a "water of the United States," as defined in 40 C.F.R. § 122.2 and, therefore, part of the "navigable waters" as defined in Section 502(7) of the CWA. Eastern Metal Recycling does not have a SPDES permit for these discharges of pollutants. Thus, Eastern Metal Recycling is discharging polluted industrial stormwater into navigable waters of the United States without the permit required under Sections 301 and 402 of the CWA.

¹⁰ See 6 N.Y.C.R.R. §§ 702, 703.

¹¹ See CWA §§ 301(a), 402.

¹² 33 U.S.C. § 1362(12).

¹³ EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity. See, e.g., 40 C.F.R. § 122.26(c)(i)(E)(6) (using 0.1 inches as the distinguishing threshold of a storm event).

¹⁴ See National Weather Service Albany, NY, *Climatological Report (Annual)*, NAT'L WEATHER SERV., <https://forecast.weather.gov/product.php?site=NWS&product=CLA&issuedby=ALB> (last visited June 22, 2017).

B. Eastern Metal Recycling is Violating the Clean Water Act by Failing to Apply for SPDES Permit Coverage.

Eastern Metal Recycling is engaged in the business of purchasing, collecting, storing, processing, and reselling scrap metal and therefore is an industrial discharger engaged in scrap metal recycling. Accordingly, Eastern Metal Recycling is a scrap and waste materials facility pursuant to Standard Industrial Classification (“SIC”) Group 5093, which is an industrial activity included in Sector N of the General Permit.

Pursuant to Section 402(a) and (p) of the CWA and regulations promulgated by EPA pursuant to the CWA, Eastern Metal Recycling must apply for coverage under the General Permit or an individual SPDES permit for Eastern Metal Recycling’s discharge of polluted stormwater. In addition, Eastern Metal Recycling must apply for an individual SPDES permit if the Facility is discharging process wastewater, or has any other non-stormwater discharge containing pollutants that is not authorized by the General Permit. By failing to apply for coverage under the General Permit or an individual permit, Eastern Metal Recycling is violating CWA Sections 301(a) and 402(a) and (p) and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).¹⁵

To be eligible to discharge under the General Permit, Eastern Metal Recycling must submit to DEC a registration form called a “Notice of Intent.”¹⁶ Notice of Intent forms are available online from DEC.¹⁷ To register, Eastern Metal Recycling is required, among other things, to list all stormwater discharges, including descriptions of the industrial activities taking place in the drainage area of each discharge and the acreage of industrial activity exposed to stormwater, the separate storm sewer system or immediate surface water body or wetland to which site runoff discharges, and the name of the watershed and nearest waterbody to which the site ultimately discharges and information about whether the receiving waters are impaired.¹⁸ Eastern Metal

¹⁵ Sections 301(a) and 402(a) and (p) make it unlawful for Eastern Metal Recycling to discharge stormwater associated with industrial activity without obtaining a NPDES permit. 40 C.F.R. sections 122.26(c)(1) and (e)(1) require Eastern Metal Recycling to apply for a NPDES permit that covers Eastern Metal Recycling’s discharge of stormwater associated with industrial activity.

¹⁶ See General Permit, Part I.E.3. In notifying Eastern Metal Recycling that the Clean Water Act requires coverage under and compliance with a valid NPDES permit in order to lawfully discharge, and that submission of a Notice of Intent to DEC is required in order to obtain coverage under the General Permit, Riverkeeper does not concede that all of the activities conducted at the Facility are necessarily eligible for coverage under that permit. For example, if the Facility is discharging process wastewater, such as wash water, or has any other polluted non-stormwater discharge that is not authorized by the General Permit, then an individual NPDES permit is required and the failure to obtain and comply with an individual NPDES permit for such discharges also violates CWA §§ 301(a) and 402(p). The conditions for eligibility to discharge under the General Permit are provided in Part I.C. of the permit.

¹⁷ See Notice of Intent for Stormwater Discharges Associated with Industrial Activity under the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit GP-0-12-001 (MSGP), New York State Department of Environmental Conservation, Division of Water, Bureau of Water Permits.

¹⁸ See Division of Water, NY DEC, *Notice of Intent For Stormwater Discharges Associated with Industrial Activity under the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit GP-0-12-001 (MSGP)* (2012), available at: http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

Recycling has failed to prepare and file a Notice of Intent or an application for an individual permit.¹⁹

C. Eastern Metal Recycling is Violating the Clean Water Act by Failing to Comply with the General Permit.

As a discharger of stormwater associated with industrial activity, Eastern Metal Recycling must comply at all times with the requirements of the General Permit (or an individual permit).²⁰ By discharging stormwater associated with industrial activity without complying with the General Permit, Eastern Metal Recycling is violating CWA Sections 301(a) and 402(a) and (p).²¹ The main General Permit requirements that Eastern Metal Recycling has failed and continues to fail to meet are explained further below.

1. Eastern Metal Recycling has not developed and implemented a Stormwater Pollution Prevention Plan.

Before submitting a Notice of Intent, Eastern Metal Recycling must prepare, make available, and implement a Stormwater Pollution Prevention Plan (“SWPPP”) in accordance with schedules established in the General Permit.²² The SWPPP must identify potential sources of pollution that may affect the quality of stormwater discharges associated with industrial activity. Further, the SWPPP must describe and ensure the implementation of practices that minimize the amount of pollutants in these discharges and that assure compliance with the other terms and conditions of the General Permit, including achievement of effluent limitations.²³

Among other things, the SWPPP must include: a general site description, a general location map identifying the location of the facility and all receiving waters to which stormwater discharges, information related to a company stormwater pollution prevention team, a summary of potential pollutant sources, a description of control measures and best management practices, and schedules and procedures for implementation of control measures, monitoring and inspections.²⁴

Eastern Metal Recycling has not developed and implemented a legally compliant SWPPP, as required by Part III of the General Permit.²⁵

¹⁹ A thorough search of EPA’s Enforcement & Compliance History Online (“ECHO”) database and DEC’s records reveals that no Notice of Intent has been submitted for the Facility.

²⁰ This section discusses the compliance requirements of the General Permit. If Eastern Metal Recycling elects to seek coverage under an individual NPDES permit instead, the conditions of that individual permit will be at least as strict as those of the General Permit, thus Eastern Metal Recycling will still be required to comply with all of the following.

²¹ Sections 301(a) and 402(a) and (p) make it unlawful for Eastern Metal Recycling to discharge stormwater associated with industrial activity without first complying with all of the conditions established in a NPDES permit.

²² See General Permit Part III.B.

²³ See General Permit Part III.A.

²⁴ See General Permit Part III.C.

²⁵ Riverkeeper believes no SWPPP exists. If a SWPPP exists, then it is either facially inadequate or has not been fully and adequately implemented.

2. Eastern Metal Recycling has not implemented control measures and Best Management Practices that meet the best available technology standards.

Eastern Metal Recycling cannot legally discharge stormwater under the General Permit until Eastern Metal Recycling implements mandatory general and sector-specific control measures called Best Management Practices (“BMPs”) in order to minimize the discharge of pollutants from the Facility.²⁶ The selected measures must reduce the discharge of pollution from the Facility to the extent practicable through use of the best available technology for the industry.

The General Permit requires that “[t]he owner or operator must select, design, install, and implement control measures (including best management practices),” in accordance with good engineering practices, to meet the effluent limits contained in the permit.²⁷ The General Permit’s effluent limits include both numeric limits specific to certain sectors,²⁸ as well as non-numeric technology-based effluent limits that apply to all facilities.²⁹ These non-numeric technology-based restrictions include minimizing the exposure of pollutants to stormwater³⁰ and minimizing the discharge of pollutants in stormwater³¹ “to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice.”³²

Eastern Metal Recycling has not minimized the discharge of pollution to the extent achievable by implementing control measures or BMPs that are technologically achievable and economically practicable and achievable in light of best industry practice, as required by Parts I.B.1 and VIII of the General Permit.

3. Eastern Metal Recycling has not conducted routine site inspections and complied with monitoring, recordkeeping, and reporting requirements.

Eastern Metal Recycling must conduct an annual comprehensive site inspection and evaluation of areas where industrial materials or activities are exposed to precipitation or where spills and leaks have occurred within the past three years.³³ The inspection must ensure that all stormwater discharges are adequately controlled and that all BMPs are functioning as expected. Records of this inspection must be kept for five years.³⁴

²⁶ See General Permit Part I.B.1, see also Part VII (setting forth sector-specific control measures and practices).

²⁷ General Permit Part I.B.1.a; see also Part III.C.7 (“The SWPPP must document the location and type of BMPs installed and implemented at the facility to achieve the non-numeric effluent limits in Part I.B.1.a.(2) and where applicable in Part VIII, and the sector specific numeric effluent limitations in Part VIII.”).

²⁸ See General Permit, Part VIII.

²⁹ See General Permit, Part I.B.1.a.2.

³⁰ See General Permit, Part I.B.1.a.2.a.

³¹ See General Permit, Part I.B.1.a.2.f.

³² General Permit, Part I.B.1.

³³ See General Permit, Part IV.A.1.

³⁴ See General Permit, Part IV.A.2.

In addition, qualified facility personnel must carry out routine inspections at least quarterly.³⁵ During these inspections, personnel must evaluate conditions and maintenance needs of stormwater management devices, detect leaks and ensure the good condition of containers, evaluate the performance of the existing stormwater BMPs described in the SWPPP, and document any deficiencies in the implementation and/or adequacy of the SWPPP.³⁶ Such deficiencies must then be addressed through corrective actions.

The General Permit also requires that all covered facilities conduct multiple types of analytical monitoring, and DEC may require additional individualized monitoring as well.³⁷ In particular, all facilities authorized under the General Permit must:

- collect and analyze stormwater samples for each outfall at least annually;³⁸
- conduct visual monitoring of stormwater discharges at least quarterly;³⁹
- perform an annual dry weather inspection to detect non-stormwater discharges;⁴⁰
- inspect, sample and monitor discharges from coal pile runoff;⁴¹
- inspect, sample and monitor discharges from secondary containment structures and transfer areas;⁴²
- document storm events during which any samples are taken;⁴³
- document all of these monitoring activities;⁴⁴
- keep records of the monitoring with the Facility's SWPPP;⁴⁵ and
- submit an annual report to DEC accompanied by a Discharge Monitoring Report detailing the results of any required stormwater samples, as well as reports that documents any instance of non-compliance with benchmarks or numeric effluent limitations.

Because Eastern Metal Recycling engages in industrial activities associated with Sector N, sampling is required for:

- Total Suspended Solids
- Chemical Oxygen Demand
- Oil and Grease
- Total Recoverable Aluminum
- Total Recoverable Cadmium

³⁵ See General Permit, Part III.C.7.b.2.

³⁶ See General Permit, Part III.C.7.b.1 and b.3.

³⁷ See General Permit, Part IV.B.3.

³⁸ See General Permit, Part IV.B.1.c (requiring at least annual collection and analysis of stormwater samples). See General Permit, Part IV.B.1.d, .e, .f, and .g for obligations to sample more frequently.

³⁹ See General Permit, Part IV.B.1.a.

⁴⁰ See General Permit, Part IV.B.1.b.

⁴¹ See General Permit, Part IV.B.1.d.

⁴² See General Permit, Part IV.B.1.f.

⁴³ See General Permit, Part IV.B.2.c.

⁴⁴ See, e.g., General Permit, Parts IV.B.1.a.8, IV.B.1.b.4, IV.B.1.c.9, see generally Part IV.E.

⁴⁵ See General Permit, Part IV.E.

- Total Chromium
- Total Recoverable Copper
- Total Recoverable Lead
- Total Recoverable Zinc
- Benzene;
- Ethylbenzene;
- Toluene; and
- Xylene⁴⁶

Riverkeeper is not necessarily aware of all industrial activities taking place at the Facility. To the extent that industrial activities other than the above are carried out at the Facility, other sampling may be required as well.⁴⁷ This notice provides Eastern Metal Recycling with sufficient information to identify the standards and limitations that apply to all categories of industrial activity.

Eastern Metal Recycling has failed to conduct the required annual and other routine inspections, monitoring, and testing, as required by, at least, Parts III, IV, and VIII of the General Permit. Eastern Metal Recycling also has failed to retain records and submit monitoring reports to DEC, as required by, at least, Parts IV and VIII of the General Permit.

4. Eastern Metal Recycling has failed to comply with additional requirements located in Part VIII of the General Permit.

As noted above, the General Permit contains various requirements specific to Sector N. These requirements, some of which are referenced above, are collected in Part VIII of the General Permit. They include:

- A requirement that the site map shall identify the locations where the following activities or sources may be exposed to precipitation/surface runoff:
 - Locations of haul and access roads;
 - Scrap and waste material storage areas;
 - Outdoor scrap and waste processing equipment;
 - Areas where materials are sorted, transferred, stockpiled; and
 - Containment areas.
- A requirement that the SWPPP include a program to control materials received for processing
 - Notify suppliers/public which scrap materials will not be accepted at the facility or are only accepted under certain conditions;
 - Develop and implement procedures to inspect inbound shipments of recyclable materials;

⁴⁶ See General Permit Part VIII, Sector N.

⁴⁷ See General Permit, Part VIII.

- Develop and distribute educational material targeting the public and/or commercial drivers of inbound vehicles; and
 - Training targeted for personnel engaged in the inspection and acceptance of inbound recyclable materials.
- A requirement that the plan address BMPs to minimize contact of particulate matter from materials stored indoors or under cover from coming in contact with surface runoff. The SWPPP shall document considerations of the following BMPs (or their equivalents):
 - Good housekeeping measures, including frequent sweeping of haul and access roads and the use of dry absorbent or wet vacuum clean up methods, to contain or dispose/recycle residual liquids originating from recyclable containers; and
 - Good housekeeping measures to prevent the accumulation of particulate matter and fluids, particularly in high traffic areas.
- A requirement that the SWPPP describe BMPs to minimize contact of stormwater runoff with stockpiled materials, processed materials and non-recyclable wastes. The SWPPP shall document considerations of the following BMPs (or their equivalents):
 - Store the equivalent one day's volume of recyclable materials indoors;
 - Containment or diversion structures such as dikes, berms, culverts, trenches, elevated concrete pads, and grading installed where appropriate to minimize contact of stormwater runoff with outdoor processing equipment or stored materials;
 - Diversion of runoff away from storage areas via dikes, berms, containment trenches, culverts and surface grading;
 - Cover containment bins, dumpsters, roll off boxes;
 - Permanent or semi-permanent covers over areas where materials are transferred, stored or stockpiled;
 - Install a sump/pump with each containment pit, and discharge collected fluids to a sanitary sewer system;
 - Sediment traps, vegetated swales and strips, catch basin filters and sand filters to facilitate settling or filtering of sediments;
- A requirement that the plan address BMPs to minimize contact of residual liquids and particulate matter from materials stored indoors or under cover from coming in contact with surface runoff. The SWPPP shall document considerations of the following BMPs (or their equivalents):
 - Prohibit the practice of allowing washwater from tipping floors or other processing areas from discharging to the storm sewer system;
 - Disconnect or seal off all floor drains connected to the storm sewer system;
 - Drums containing liquids, especially oil and lubricants, should be stored: indoors; in a bermed area; in overpack containers or spill pallets; or in similar containment devices;
 - Drip pans or equivalent measures shall be placed under any leaking piece of stationary equipment until the leak is repaired. The drip pans shall be inspected

for leaks and potential overflow and all liquids properly disposed of in accordance with RCRA requirements; and

- Liquid wastes, including used oil, shall be stored in materially compatible and non-leaking containers, and be disposed or recycled in accordance with all requirements under the Resource Recovery and Conservation Act (RCRA), and State or local requirements.

In addition, with the requirements listed above, facilities with activities described by subsector definitions must comply with the applicable requirements in this section in addition to the general Sector N requirements (above), and the requirements of Part III. C. They include:

- A requirement that they provide totally enclosed drop off containers for the public whenever possible. When determined to be impractical, the SWPPP must describe the measures implemented to either prevent the discharge of contaminated stormwater from containers, or the containers should be subject to screening and monitoring required in Part III.F.3.
- A requirement that facilities develop and implement a program to control what is received at the facility. Such plan shall include:
 - Provisions for information/education flyers, brochures and pamphlets to suppliers of scrap and recyclable waste materials on:
 - Draining and proper recycling/disposal of residual fluids prior to delivery to the facility when applicable (e.g., from vehicles and equipment engines, radiators, and transmissions, oil filled transformers, and individual containers or drums);
 - Removal and proper collection, recycling and/or disposal of mercury switches, mercury containing parts, lead tire weights, lead battery cable ends air conditioning refrigerants, and small PCB capacitors from vehicles; and
 - Removal and proper collection/disposal of PCB capacitors, ballasts, CFCs/HCFCs, mercury switches, mercury containing components and other sources of potential contaminants from appliances
 - Procedures to require certification by suppliers of inbound shipments of recyclable materials that the items identified above were completed
 - Procedures to inspect inbound shipments of recyclable materials to ensure that the items identified above were completed
- A requirement that facilities accepting lead acid batteries develop and implement a scrap lead acid battery program The plan shall address measures and controls for the proper handling, storage and disposal of scrap lead acid batteries. The SWPPP shall document decisions relating to the following BMP options:
 - Segregate scrap lead acid batteries from other scrap materials;
 - A description of procedures and/or measures for the proper handling, storage and disposal of cracked or broken batteries;
 - A description of measures to collect and dispose of leaking lead acid battery fluid;

- A description of measures to minimize and, whenever possible, eliminate exposure of scrap lead acid batteries to precipitation or runoff; and,
 - A description of employee training for the management of scrap batteries.
- A requirement that facilities install oil/water separators, sumps and dry adsorbents for areas where potential sources of residual fluids are stockpiled (e.g., automotive engine storage areas)
 - The plan shall implement measures necessary to minimize contact of surface runoff with residual cutting fluids. The SWPPP shall document considerations of the following BMPs (or their equivalents):
 - Store all turnings exposed to cutting fluids under some form of permanent or semi-permanent cover. Stormwater discharges from these areas are permitted provided the runoff is first treated by an oil/water separator or its equivalent. Procedures to collect, handle, and dispose or recycle residual fluids that may be present shall be identified in the plan; and
 - Establish dedicated containment areas for all turnings that have been exposed to cutting fluids. Stormwater runoff from these areas can be discharged provided:
 - The containment areas are constructed of either concrete, asphalt or other equivalent type of impermeable material;
 - There is a drainage collection system for runoff generated from containment areas;
 - There is a schedule to maintain the oil/water separator (or its equivalent); and
 - Procedures are identified and implemented for the proper disposal or recycling of collected residual fluids.
- A requirement that the SWPPP include BMPs to minimize surface runoff from coming in contact with scrap processing equipment. In the case of processing equipment that generate visible amounts of particulate residue (e.g., shredding facilities), the plan shall describe measures to minimize the contact of residual fluids and accumulated particulate matter with runoff (i.e., through good housekeeping, preventive maintenance, etc.). The SWPPP shall do
 - Provide stormwater containment within a 30 foot perimeter of the following fixed equipment: shears, balers, shredders, grinders, screeners and conveyors;
 - Oil/water separators or sumps;
 - Catch basin filters or sand filters;
 - Use and maintenance of silt and/or other fencing around light material processing to prevent migration lightweight materials such as foam by wind and stormwater runoff.
- A requirement that, at minimum, the SWPPP document considerations of the following BMPs (or their equivalents):

- Use and maintenance of silt and/or other fencing around shredder fluff or other light material processing to prevent migration lightweight materials such as foam by wind and stormwater runoff;
 - The ground in the entire shredder and downstream area shall be covered by asphalt or concrete, and drainage shall be controlled; and
 - Ground surface must be cleaned/swept at the end of each shift to prevent dirt and debris from being tracked to other areas.
- A requirement that the plan include BMPs to minimize/eliminate contact between residual liquids from waste materials stored indoors and surface runoff. The following Non-Structural BMPs must be implemented:
 - Development and implementation of procedures for material handling (including labeling and marking); and
 - Keep a sufficient supply of dry absorbent materials or a wet vacuum system to collect spilled or leaked materials.
- A requirement that SWPPP document decisions relating to consideration of the following Structural BMPs:
 - An appropriate containment structure, such as trenches, curbing, gutters or other equivalent measures; and
 - A drainage system, including appurtenances (e.g., pumps or ejectors, or manually operated valves), to handle discharges from diked or bermed areas. Drainage shall be discharged to an appropriate treatment facility, sanitary sewer system, or otherwise disposed of properly. Discharges from these areas may require coverage under a separate SPDES permit or industrial user permit under the pretreatment program.
- A requirement that facilities maintain a sufficient supply of absorbent materials or a wet vacuum system to collect spills.
- A requirement that the SWPPP document decisions relating to consideration of the following Structural BMPs:
 - Appropriate containment structures (e.g., dikes, berms, curbing, pits) to store the volume of the largest single tank, with sufficient extra capacity for precipitation;
 - Drainage control and other diversionary structures; and
 - For storage tanks, provide corrosion protection and/or leak detection systems.

The following SWPPP special conditions have been established for facilities that are engaged in dismantling ships, marine salvaging, and marine wrecking ships for scrap. Scrapping of vessels shall be accomplished ashore beyond the range of mean high tide, whenever practicable. If this activity must be conducted while a vessel is afloat or grounded in State waters, then the owner or operator must employ BMPs to minimize the amount of pollutants released.

- A requirement that the following BMPs be implemented during those periods when vessels (ships, barges, yachts, etc.) are brought to the facility's site for recycling, scrapping and storage prior to scrapping:
 - Fixed or floating platforms sufficiently sized and constructed to catch and prevent scrap materials and pollutants from entering waters of the State (or equivalent measures approved by the Department) shall be used as work surfaces when working on or near the water surface. These platforms shall be cleaned as required to prevent pollutants from entering State waters and at the end of each work shift. All scrap metals and pollutants shall be collected in a manner to prevent releases (containerization is recommended);
 - There shall be no discharge of oil or oily wastewater at the facility. Drip pans and other protective devices shall be required for all oil and oily waste transfer operations to catch incidental spillage and drips from hose nozzles, hose racks, drums or barrels. Drip pans and other protective devices shall be inspected and maintained to prevent releases. Oil and oily waste must be disposed at a permitted facility and adequate documentation of off-site disposition shall be retained for review by the board upon request;
 - During the storage/breaking/scrapping period, oil containment boom(s) shall be deployed either around the vessel being scrapped, or across the mouth of the facility's wet slip, to contain pollutants in the event of a spill. Booms must be inspected, maintained, and repaired as needed. Oil, grease and fuel spills shall be prevented from reaching State waters. Cleanup shall be carried out promptly after an oil, grease, and/or fuel spill is detected;
 - Paint and solvent spills shall be immediately cleaned up to prevent pollutants from reaching storm drains, deck drains, and State waters; and
 - Contaminated bilge and ballast water shall not be discharged to waters of the State. If it becomes necessary to dispose of contaminated bilge and ballast waters during a vessel breaking activity, the wastewater must be disposed at a permitted facility and adequate documentation of off-site disposition shall be retained for review by the board upon request.
- A requirement that the SWPPP include measures to minimize stormwater contamination at loading/unloading areas, and from equipment or container failures. The plan may refer to applicable portions of other existing plans such as SPCC plans required under 40 CFR Part 112. Such as:
 - Describe spill prevention and response measures to address areas that are potential sources of fluid leaks or spills;
 - Provide for immediate containment and clean up of spills/leaks. If malfunctioning equipment is responsible for the spill/leak, repairs shall also be conducted as soon as possible;
 - Specify cleanup procedures, including the use of dry absorbents. Where dry absorbent cleanup methods are used, an adequate supply of dry absorbent material shall be maintained on site. Used absorbent material shall be disposed of properly; and

- Place drip pans or equivalent measures under any leaking piece of stationary equipment until the leak is repaired. The drip pans shall be inspected for leaks and potential overflow and all liquids properly disposed of in accordance with RCRA requirements.
- A requirement that the SWPPP document considerations of the following BMPs (or their equivalents):
 - Store drums containing liquids, especially oil and lubricants, indoors; in a bermed area; in overpack containers or spill pallets; or in similar containment devices;
 - Install overfill prevention devices on all fuel pumps or tanks;
 - Install an alarm and/or pump shut off system on outdoor equipment with hydraulic reservoirs exceeding 150 gallons in order to prevent draining the tank contents in the event of a line break. Alternatively, the equipment may have a secondary containment system capable of containing the contents of the hydraulic reservoir plus adequate freeboard for precipitation.

Eastern Metal Recycling's activities are included in the definition of industrial activity to which the CWA applies. Therefore, Eastern Metal Recycling must obtain coverage under and comply with the requirements of the General Permit, including those specific to Eastern Metal Recycling industrial activities, as described in Part VIII and outlined above. Eastern Metal Recycling has failed to obtain coverage under the General Permit and comply with these additional requirements.

5. Eastern Metal Recycling has failed to meet certain additional criteria that apply because Eastern Metal Recycling discharges into an impaired waterbody.

Discharges to an impaired waterbody are not eligible for coverage under the General Permit if the cause of impairment is a pollutant of concern included in the benchmarks and/or effluent limitations to which the facility is subject unless the facility:

- a. Prevents all exposure to stormwater of the pollutant(s) for which the waterbody is impaired,
- b. Documents that the pollutant for which the waterbody is impaired is not present onsite, or
- c. Provides additional information in the SWPPP to minimize the pollutant of concern causing the impairment as specified in Part III.F.4.⁴⁸

The Hudson River is an impaired waterbody listed on New York's 303(d) list. Its impairment is caused by PCBs. Benzene, toluene, Ethylbenzene, and xylene (together "BTEX") are toxics included in the benchmarks monitoring requirements to which the Facility is subject. Eastern Metal Recycling has not prevented BTEX from being exposed to stormwater. Eastern Metal Recycling has not documented that BTEX is not present onsite. Eastern Metal Recycling has not submitted a SWPPP with the additional information specified in Part III.F.4 of the General Permit.

⁴⁸ See General Permit Part II.C.1.

In addition, because the Hudson River is impaired by a pollutant of concern included in the benchmarks and/or effluent limitations to which the Facility is subject, Eastern Metal Recycling is required to collect and analyze stormwater samples for each outfall of the impairing pollutants quarterly.⁴⁹ Eastern Metal Recycling has failed to comply with this requirement.

6. Eastern Metal Recycling is violating the Clean Water Act.

In sum, Eastern Metal Recycling's discharge of stormwater associated with industrial activities without a permit, Eastern Metal Recycling's failure to apply for permit coverage, and Eastern Metal Recycling's failure to comply with the above-listed conditions of the General Permit (or an individual SPDES permit) constitute violations of the General Permit and of Sections 301(a) and 402(p) of the Clean Water Act.

III.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

Eastern Metal Recycling is the person, as defined by Section 502(5) of the CWA, responsible for the violations alleged in this Notice. Eastern Metal Recycling has operational control over the day-to-day industrial activities at this Facility. Therefore, Eastern Metal Recycling is responsible for managing stormwater at the Facility in compliance with the CWA. We hereby put Eastern Metal Recycling on notice that if we subsequently identify additional persons as also being responsible for the violations set forth above, we intend to include those persons in this action.

IV.

LOCATION OF THE ALLEGED VIOLATIONS

The violations alleged in this Notice have occurred and continue to occur at the Facility located at 145 Cannon St., Green Island, NY 12183. During precipitation events, rain water rushes off the property and into storm drains located on adjacent streets. The stormwater then flows through a hydrological connection discharging directly into the Hudson untreated. The failure to develop and implement pollution prevention plans and take the other required measures are violations occurring at the Facility in general and in the inadequate documents themselves.⁵⁰

⁴⁹ 303(d) List at 20.

⁵⁰ The federal courts have held that a reasonably specific indication of the area where violations occurred, such as the name of the facility, is sufficient and that more precise locations need not be included in the notice. *See, e.g., Natural Resources Defense Council v. Southwest Marine, Inc.*, 945 F. Supp. 1330, 1333 (S.D. Cal. 1996), *aff'd* 236 F.3d 985, 996 (9th Cir. 2000); *City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995); *United Anglers v. Kaiser Sand & Gravel Co.*, No. C 95-2066 CW, 1995 U.S. Dist. LEXIS 22449 at *4 (N.D. Cal. Sept. 27, 1995)

V.

DATES OF THE VIOLATION

Every day upon which Eastern Metal Recycling has failed to apply for permit coverage since Eastern Metal Recycling first commenced operations at the Facility and discharged polluted stormwater is a separate violation of Section 301(a) of the CWA and EPA's regulations implementing the CWA.⁵¹

Additionally, Eastern Metal Recycling has discharged pollution without a permit in violation of Section 301(a) of the CWA on every day since Eastern Metal Recycling commenced operations at the Facility on which there has been a measurable precipitation event or discharge of previously accumulated precipitation (i.e., snowmelt) over 0.1 inches.

Finally, if Eastern Metal Recycling seeks permit coverage after receiving this letter but fails to fully comply with the requirements of the General Permit (or an individual permit), each day upon which Eastern Metal Recycling claims coverage under a SPDES permit but fails to comply with that permit will constitute a separate day of violation with respect to each unmet condition of that permit.

Eastern Metal Recycling is liable for the above-described violations occurring prior to the date of this letter, and for every day after the date of this letter that these violations continue. In addition to the violations set forth above, this Notice covers all violations of the CWA evidenced by information that becomes available to us after the date of this Notice of Intent to File Suit.⁵² These violations are ongoing, and barring full compliance with the permitting requirements of the Clean Water Act, these violations will continue.

VI.

RELIEF REQUESTED

First, we will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d) and such other relief as permitted by law. We will seek an order from the Court requiring Eastern Metal Recycling to obtain SPDES permit coverage and to correct all other identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

⁵¹ See also 33 U.S.C. §§ 402(p)(3)(A) and (p)(4)(A) (requiring the establishment of industrial stormwater NPDES permits and of a permit application process).

⁵² See, e.g. *Public Interest Research Grp. v. Hercules, Inc.*, 50 F.3d 1239, 1248-49 (3d Cir.1995) (a notice that adequately identifies specific violations to a potential defendant also covers repeated and related violations that the plaintiff learns of later. "For example, if a permit holder has discharged pollutant 'x' in excess of the permitted effluent limit five times in a month but the citizen has learned only of four violations, the citizen will give notice of the four violations of which the citizen then has knowledge but should be able to include the fifth violation in the suit when it is discovered.")

Second, pursuant to Section 309(d) of the CWA,⁵³ each separate violation of the CWA subjects Eastern Metal Recycling to a penalty not to exceed \$32,500 per day for each violation which occurred between March 15, 2004 and January 12, 2009, up to \$37,500 per day for each violation that occurred after January 12, 2009, and \$52,414 per day for each violation that occurred after November 2, 2015. We will seek the full penalties allowed by law.

Third and lastly, pursuant to Section 505(d) of the CWA, we will seek recovery of their litigation fees and costs (including reasonable attorney and expert witness fees) associated with this matter.

VII.

PERSONS GIVING NOTICE

The full name, address, and telephone number of the persons giving notice are as follows:
Riverkeeper, Inc.
20 Secor Road
Ossining, NY 10562
(914) 422-2133
Attn.: Michael Dulong

VIII.

IDENTIFICATION OF COUNSEL

We are represented by legal counsel in this matter. The name, address, and telephone number of our attorneys are:

Pace Environmental Litigation Clinic, Inc.
Elisabeth Haub School of Law
78 North Broadway
White Plains, NY 10603
Tel (914) 422-4343

IX.

CONCLUSION

The foregoing provides more than sufficient information to permit Eastern Metal Recycling to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.⁵⁴

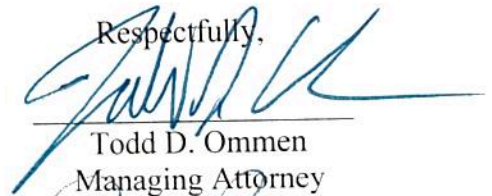
⁵³ 33 U.S.C. § 1319(d); *see also* 40 C.F.R. § 19.4 (Adjustment of Civil Monetary Penalties for Inflation).

⁵⁴ 40 C.F.R. § 135.3(a).

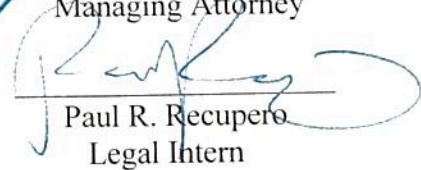
If Eastern Metal Recycling has developed a SWPPP, we request that Eastern Metal Recycling send a copy to the undersigned attorney.⁵⁵ Otherwise, we encourage Eastern Metal Recycling to begin developing a SWPPP immediately after receiving this letter and ask that Eastern Metal Recycling please inform the undersigned attorney of Eastern Metal Recycling's efforts so we can work with Eastern Metal Recycling to avoid disputes over the contents of the SWPPP.⁵⁶

During the 60-day notice period, we are willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of protracted litigation. If Eastern Metal Recycling wishes to pursue such discussions, please contact the undersigned attorney immediately so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court, regardless of whether discussions are continuing at the conclusion of the 60 days.

Respectfully,



Todd D. Ommen
Managing Attorney



Paul R. Recupero
Legal Intern

⁵⁵ Note that under Part III.D.2 of the General Permit, the owner or operator of a facility "must make a copy of the SWPPP available to the public within 14 days of receipt of a written request."

⁵⁶ We will not send a new notice letter in response to any effort Eastern Metal Recycling makes to come into compliance with the Clean Water Act after receiving this letter, for example, by developing a SWPPP. The federal courts have held that citizens sending a notice letter are not required to identify inadequacies in compliance documents that do not yet exist and are "not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of [a defendant's] post-notice compliance efforts." *WaterKeepers N. Cal. v. AG Indus. Mfg.*, 375 F.3d 913, 920 (9th Cir. 2004). See also *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000) ("subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant. The defendant's later changes . . . do not retroactively divest a district court of jurisdiction under 33 U.S.C. § 1365(b)."); *City of New York v. Anglebrook L.P.*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995) (plaintiff's notice letter based on inadequacies of defendant's original SWPPP held sufficient to establish court's jurisdiction, even though defendant later prepared a revised SWPPP).

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cc:

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Washington, DC 20460

Pete Lopez, Acting EPA Region 2 Administrator
Environmental Protection Agency
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